Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1049

ALIQUIPPA AND SOUTHERN RAILROAD COMPANY, ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

No. 78-1069

BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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Respondents, Duval Sales Corporation, International Minerals & Chemical Corporation, Evans Products Company and Pullman Leasing Company, submit that the judgment of the United States Court of Appeals for the Third Circuit, reported at 583 F.2d 678, presents no special or important issue that warrants issuance by this Court of the requested writ of certiorari.

STATEMENT OF THE CASE

By order entered April 7, 1977, in Ex Parte No. 289, *Remittance of Demurrage Charges by Common Carriers of Property by Rail,* 353 ICC 567, the Interstate Commerce Commission (ICC) adopted a regulation (49 CFR § 1254.10) requiring the remittance to freight car owners of all demurrage charges collected by the delivering carrier that are in excess of ten dollars per car per day.

Petitions for review of that order were denied by the United States Court of Appeals for the Third Circuit, unanimously, by opinion and judgment entered September 6, 1978, in *Baltimore and Ohio Chicago Terminal Railroad Company, et al.* v. *United States, et al.,* 583 F.2d 678. Petitions for rehearing were denied by that Court on October 5, 1978, unanimously.

In upholding the order of the ICC, the Court of Appeals held, *inter alia,* that the ICC's view that former section 1(6) of the Interstate Commerce Act (the Act) (49 USC § 10750) authorized promulgation of the regulation was not unreasonable; that the ICC's failure to comply with the time limits of former section 17(14)(b) of the Act did not require or warrant dismissal of the ICC proceedings; and that the inclusion of private car owners in the ICC's demurrage remittance order did not violate the Act.

NO ISSUE IS PRESENTED WHICH WARRANTS ISSUANCE OF THE WRIT REQUESTED.

The judgment of the Court of Appeals is based upon sound, non-controversial statutory construction which presents no issues warranting full review by this Court.

The determination by the Court of Appeals that it is not unreasonable to interpret 49 USC § 10750 as authorizing the ICC's order is fully consistent with this Court's decision in *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965), and the legislative history of the recent amendment of that statute. The Court of Appeals' ruling that the ICC's failure to comply with the time limits of former 49 USC § 17(14)(b) does not require or warrant dismissal of the ICC proceedings is based upon the lack of such a sanction in the statute and basic equitable considerations, including lack of prejudice to protestants before the ICC. The conclusion of the Court of Appeals that inclusion of private car owners in the demurrage remittance regulation does not violate the Act is based upon the analysis of demurrage charges by Judge Prettyman in the leading case of *Iversen* v. *United States,* 63 F. Supp. 1001 (D. D.C., 1946), aff'd. mem. 327 U.S. 767 (1946), cited with approval by this Court in *ICC* v. *Oregon Pac. Indus., Inc.,* 420 U.S. 184, 190 (1975).

Petitioners' contention that the Court of Appeals upheld the ICC's conclusion that inclusion of private car owners in the demurrage remittance regulation does not violate the Act on grounds not invoked by the ICC is also unsound. Although phrased somewhat differently by the ICC and the Court of Appeals, the essence of the holding of each of those bodies on that point was that inclusion of private car owners in the demurrage remittance regulation cannot result in unlawful rebates to shippers because the demurrage-collecting railroad retains its full published rates and charges in all instances under the regulation.

CONCLUSION

The petitions for writ of certiorari to the Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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